

**Fiscal Year 2000
Findings of the
NIH Board of Contracts Awards**

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I. Introduction

In accordance with the NIH Policy Manual Chapter 6304.71, Presolicitation and Preaward Review and Approval of Proposed Contract Actions, dated June 28, 2000, the NIH Board of Contract Awards (Board) performed presolicitation and preaward reviews of contract files selected by the NIH Chief Contracting Officers. During Fiscal Year (FY) 2000, the Board reviewed 47 filesB25 presolicitation and 22 preaward files. Following is a summation of those reviews categorized by the steps in the procurement process, e.g., Acquisition Plan, Request for Proposal, etc. Unless otherwise noted, each issue below relates to one comment raised by the Board. The italicized information contained in brackets [] is provided for guidance.

II. Substantive Issues

A. Request for Proposal (RFP)

1. The extent of participation of small disadvantaged business concerns in performance of the contract was not included in the evaluation criteria of an unrestricted solicitation over \$500,000. *[See Federal Acquisition Regulation (FAR) ' 5.304(c)(4). **Four comments.**]*
2. A proposed contract in excess of \$500,000 to be awarded pursuant to a full and open competition did not contain a subcontracting plan. *[See FAR §19.702.]*
3. An open market solicitation proposed to obtain items of supplies, the majority of which are available either on the GSA Federal Supply Schedule or through internal agency resources. *[Unless otherwise provided for by law, agencies are required to satisfy their needs for supplies and services through the priority listing found @ FAR ' 8.001.]*
3. A synopsis was published in the Commerce Business Daily (CBD) as a Request for Information and a subsequent synopsis appeared for the Draft RFP, however, there was no synopsis announcing the release of the final RFP. *[See FAR ' 5.101(1) and ' 5.201(b).]*

4. A proposed contract required the offeror to perform a lease vs. purchase analysis and to furnish the leased equipment as the prime contractor thus creating an organizational conflict of interest. [*Among the principles underlying FAR Subpart 9.5, AOrganizational conflicts of interest,@ is that of Apreventing the existence of conflicting roles that might bias a contractor's judgment ...@ FAR ' 9.505(a). Thus, Acontracts for the evaluation of offers for products or services shall not be awarded to a contractor that will evaluate its own offers for products or services, or those of a competitor, without proper safeguards to ensure objectivity to protect the Government's interests.@ Id. ' 9.505-3.*]¹
5. The lease analysis function of a proposed 8(a) solicitation constituted Advisory and Assistance Services (AAS) as defined in FAR §2.101. When a proposed contract for AAS exceeds \$10 million and three years, the contracting activity must provide for multiple awards or indicate, during the procurement planning stage, which exception applies.² [*See FAR ' 16.504(c)(2).*]
6. The solicitation proposed to obtain AAS services that fall within the professional expertise of Government contracting officers, assisted as necessary by program staff. Even if such skills were not available within DHHS, the General Services Administration provides the solicited services. Agencies may not contract for advisory and assistance services to obtain professional or technical advice, which are readily available within the agency or another Federal agency.³ [*See FAR ' 7.403 and ' 37.203(c)(5).*]

C. Contract Document

1. Proposed multiple awards under an Indefinite Delivery Indefinite Quantity (IDIQ) solicitation did not set forth the procedures and selection criteria in the contract or in the ordering guidelines affording each offeror a fair opportunity to be considered for each order. [*See FAR ' 16.504(a)(4)(iv) and § 16.505. Three comments.*]

¹Reviewed by the Office of the General Counsel (OGC), Business and Administrative Law Division (BAL).

²Reviewed by the OGC/BAL.

³Ibid.

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2. An IDIQ contract did not include the required minimums and maximums. *[See FAR ' 16.505. **Three comments.**]*
3. An IDIQ contract for a base year and four 1-year options provided that the guaranteed minimum could be met anytime over the five-year period of performance. *[The FAR ' 32.703-2(b) states that any specified minimums must be ordered in the initial fiscal year.]*
4. A contract for services that appeared to be subject to the Service Contract Act (SCA) did not include the appropriate Wage Determination and the file did not include a Determination that the services were not subject to the SCA. *[See FAR ' 22.1006(a), ' 22.1018, and ' 52.222-41.]*
5. The period of performance for a contract subject to the SCA was greater than five years. *[Notwithstanding the NIH deviation that allows contracts with options to extend beyond five years, contracts subject to the SCA are statutorily precluded from extending longer than five years. See [FAR ' 17.204(e) and ' 22.1002-1.]*

D. Cost Issues

1. The file contained little to no information in support of the price reasonableness of the burdened labor rates. *[Two comments. See FAR ' 15.404.]*
2. The contract provided for a Cost-Plus-a-Percentage-of-Cost (CPPC) type contract because it provided for the collection by the contractor of a five percent administrative fee, applicable to the cost of each equipment lease furnished under subcontract. The proceeds from this fee constituted payment at a predetermined rate. Also, because payments to the contractor depended on the application of the administrative fee to the lease alternative ultimately selected by the Government, the contractor's entitlement was uncertain as of the time of contracting. Finally, the fee appeared to increase commensurately with subcontracting costs. *[The Competition in Contracting Act prohibits the use of cost-plus-a-percentage-of-cost (CPPC) contracts. 41 U.S.C. ' 254(b); see also FAR ' 16.102(c).]*⁴

⁴The guidelines for identifying a CPPC contract are A (1) whether payment is at a predetermined rate; (2) whether this rate is applied to actual performance costs; (3) whether the contractor's entitlement is uncertain at the time of contracting; and (4) whether it increases commensurately with increased performance costs. @ See

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3. The contract did not specify the pricing arrangement. Without pricing the contracting officer is unable to meet two essential statutory requirements in evaluating and awarding contracts, i.e., to evaluate price or cost to the Government in every source selection and to establish whether the cost or price is fair and reasonable at the time of award. [See FAR ' 15.304(c)(1), ' 15.402(a), and §15.404. **Three comments.**]
4. The apparent successful offeror's prices fluctuated in a manner that would not be expected, i.e., they went up and down without explanation, considering that the work to be performed did not vary from year-to-year. [See FAR ' 15.404.]
5. The file indicated that the proposed prices from two offerors were comparable when, in fact, there was nearly a 40 percent difference.

E. Evaluation/Source Selection

1. The source selection indicated that the apparent successful offeror proposed higher costs and was rated technically lower than the other firms in the competitive range and did not adequately document the tradeoffs of this arrangement. *[Although contracting officers have considerable latitude in selecting offerors through the tradeoff process, the benefits and the rationale for the tradeoffs must be perceived as reasonable and documented in the file. See FAR ' 15.101-1 and §15.406.]*
2. The apparent successful offeror took exception to two of the Government's requirements and there was no documentation to indicate that the two exceptions were addressed. *[A contract means a mutually binding legal relationship. When essential elements of the contract are not agreed upon, there is no mutuality of the parties. See FAR ' 2.101.]*
3. The evaluation criteria stated that past performance would be evaluated, however, the past performance of only one of the three offerors could be located. *[FAR 15.306(c) requires that all proposals be evaluated against all evaluation criteria.]*

II. Advisory Issues

Department of Labor Request for Advance Decision, B-207731, 62 Comp. Gen. 337 (1983). Reviewed by OGC/BAL.

A. Acquisition Plan/Request for Contract (RFC)

1. The Acquisition Plan/RFC did not address or inadequately addressed elements contained in FAR §7.105, Acquisition Plan.
 - a. The RFC did not address the strategies for implementing Performance-Based Contracting (BPC) or did not adequately address the rationale for not using BPC. *[See FAR §7.105 and FAR Subpart 37.6. Research and development contracts are not exempt from the requirements of PBC. **Five comments.**]*
 - b. The requirement appeared to fall within a commercial activity as defined in FAR Subpart 12, but did not adequately address why commercial contracting could not be used. *[P.L. 103-355 (FASA), Title VIII, provides a statutory preference for acquiring goods or services using commercial contracting methods. **Four comment.**]*
 - c. Market Research was not adequately addressed in the RFC. *[In making the determination if an item is a commercial activity, COs are required to perform market research. Since a portion of the activities classified under R&D at NIH are of a type customarily available in the commercial marketplace, the determination required by FAR Subpart 12 applies to R&D as well as Station Support contracting. **Five comments.**]*
 - d. The RFC provided a history of NIH but not a history of the specific requirement and what need it fulfilled. *[See FAR 7.105(a)(1). **Two comments.**]*
 - e. The FAR requires that the determination whether a requirement encompasses an inherently Governmental function be a matter of procurement planning. *[See FAR §7.503(b) and §11.105. **Six comments.**]*
 - f. Only one source or no sources were identified in the RFC of proposed competitive requirements. *[The FAR at §7.105(b)(ii) requires that prospective sources be identified as part of procurement planning. The HHSAR @ §315.7005(a)(7) specifies that the list must be by name and mailing address. The lack of*

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*adequate sources being identified in the RFC called into question the competitive nature of the requirement. **Two comments.**]*

- g. The awarding office's internal review questioned whether the proposed contract duplicated another contract in the office about to be awarded. The issue was not resolved prior to being submitted to the Board for review. *[The NIH Policy Manual Chapter 6304.71, Presolicitation and Preaward Review and Approval of Proposed Contract Actions, at subsection H., Notification and Submission of Contract Files, paragraph 6.c., requires that "[C]orrections as a result of the internal review must be made prior to submitting the file [to the Board for review.]"*
- h. Estimated cost and fund citation. *[The HHSAR @ §307.105-1(b)(4) requires the RFC to include the certification of funds availability along with the appropriation and accounting information citations.]*
 - (i) The Common Accounting Number (CAN) identified in the acquisition plan for a non-R&D contract began with a 42. Forty-two CANs represent extramural funds that generally require peer review of concept. No concept review was provided and no justification for using extramural funds for intramural support was submitted. *[Two comments.]*
 - (ii) The file did not contain a certification of funds availability.
- 2. The RFC proposed that a single IDIQ contract be awarded without justification. *[The FAR @ §16.500(a) promulgates a statutory preference for making multiple awards of indefinite-quantity contracts. FAR §16.504(c)(ii)(A) requires contracting officers to make the determination whether multiple awards are appropriate as part of acquisition planning. **Two comments.**]*
- 3. Information Technology (IT) security requirements were not adequately addressed. *[Six comments.] [Contracts involving IT (including those that are not directly involved in IT but use IT to store or retrieve information) must, in accordance with OMB Circular A-130, address IT System Security. The NIH Center for Information Technology (CIT) provides a web site for obtaining additional information on IT security requirements: <http://www.dcrn.nih.gov/security.html> .*

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3. Service Contract Act (SCA)
 - a. In a contract for services, the nonapplicability of the SCA was not adequately addressed. [**Four comments.**]
 - b. The RFC indicated that the contract was not subject to the SCA when approximately 70 percent of the proposed labor was “support,” e.g., laboratory technicians and administrative support staff.
4. Public Service Announcement clearance was needed and not obtained. *[All projects, including task orders under IDIQ contracts, which result in contracts that include audiovisuals, require review and approval by the Office of the Assistant Secretary for Public Affairs (OASPA). Form HHS-524, Publication Planning and Clearance Request, must be forwarded to OASPA through the OPDIV public affairs officer. Audiovisuals are defined in Chapter 6-00-15 of the Public Affairs Management Manual. **Five comments.**]*
6. Contract Type
 - a. The use of a time and materials contract was questioned. It appeared that most of the task orders could be sufficiently definitized to fixed price, which is the method preferred in the FAR. If a need exists for a time and materials type task order, then the contract should provide for different pricing mechanisms.
 - b. A contract that did not call for a specified end product and did not appear to meet the definition at FAR §16.306(d) was characterized as a completion-type contract.
 - c. The contract for services was not structured either as a completion or a level-of-effort contract.
7. The Independent Government Cost Estimate (IGCE) was cursory. [**Two comments.**]
8. As part of the planning process when acquiring capital assets, the agency is required to demonstrate that the project return on investment is equal to

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or better than alternative uses of available public resources. When capital assets are acquired under IDIQ contracts, instructions to document return on investment should be included in the ordering guidelines. *[See OMB Circular A-11, Appendix 300a, "Principles of Budgeting for Capital Asset Acquisitions," Memorandum M-97-02, dated 10/25/9.]*

B. Statement of Work (SOW)

1. The SOW required the contractor to develop and maintain a web site but did not indicate when the web site was required to be operational and did not include the cost of developing the site in the contract.
2. The SOW included contradictory delivery dates in one place the contractor was required to respond within 15 days and in another within 7 business days.
3. There were incomplete sentences in the SOW that caused the reader to be confused about the meaning of the statement.
4. The SOW required the contractor to train Government employees, but did not provide for reimbursement of the cost of that training. *[When a cost is directly attributable to a specific contract, it is inappropriate to require the contractor to include that cost in the indirect cost pool.]*
5. The SOW and the Delivery Schedule were inconsistent.
6. Since the contract was not awarded as an IDIQ task order contract, it was inappropriate to use the terminology "task order." *[In this instance the use of "work order" was more appropriate.]*
7. The SOW requires the development of a computer program that is not designated as a deliverable under the contract.
8. Record maintenance of equipment should be required in machine-readable form.
9. Privacy Act (PA)
 - a. The PA was inappropriately included in the contract. *[Three comments.]*

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- b. It appeared that the PA should have applied but it was not included in the contract. *[Two comments.]*

C. Solicitation

1. The Commerce Business Daily (CBD) Notice did not indicate that the requirement was a small business set-aside.
2. The RFP did not indicate the correct North American Industry Classification System (NAICS) [formerly SIC] Code.
3. Section M, Evaluation Factors for Award
 - a. It appeared that the solicitation intended to have mandatory and/or minimum evaluation criteria (a.k.a. go/no-go criteria), but how the minimum or go/no-go requirements would be evaluated was not clear. *[Three comments.]*
 - b. The language used in Section M that the competitive range would consist of “[a]ll offerors with a reasonable chance of award” was not consistent with the revised FAR Part 15. (See FAR 15.306(c).) *[Two comments.]*
 - c. The point scoring methodology in Section M was confusing. It was suggested that the points be simplified or eliminated.
 - d. Section M was not structured in accordance with FAR 15.304(c) or did not contain the mandatory statement concerning the relationship of cost to all other evaluation factors. *[Four comments.]*
 - e. The extent of participation of small disadvantage business concerns was not properly documented or was not included in Section M. *[Three comments.]*
 - f. Section M provides for the evaluation of some factors after the establishment of the competitive range. *[See FAR 15.306(c), Competitive range. Five comments.]*
 - g. The solicitation inappropriately indicated that the evaluation of the extent of participation of small disadvantaged businesses would be

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“subjective” when FAR §19.1202-2 and §19.1202-3 list specific factual methods for evaluating this factor. [**Two comments.**]

4. Past Performance

- a. It was unclear how past performance would be evaluated. [**Three comments.**]
- b. Reserving the evaluation of past performance until after the competitive range was established is contrary to FAR §15.306(c). [*The FAR §15.306(c) requires that all proposals be evaluated against all evaluation criteria prior to establishing the competitive range. Three comments.*]
- c. The file indicated that past performance would not be reviewed but Section L of the RFP required the submission of past performance information.

5. Since it was not clear how technical or cost would be evaluated in a proposed IDIQ contract, it was suggested that a sample task order be included in the solicitation for evaluation purposes.

6. Unjustified defacto geographical restrictions were created by requiring that offerors be within certain mile radius from NIH or meet face-to-face with NIH personnel on a weekly basis. [*Given the number of electronic communication devices available, it is important that any geographical restriction be adequately justified before including them. Two comments.*]

7. The Board recommended that a Source Selection Plan, consistent with the evaluation criteria, be developed in order to promote consistency in the way in which the evaluators score the proposals.

8. Language from FAR Part 14, Sealed Bids, was intermingled in a FAR Part 15 negotiated procurement. [**Two comments.**]

9. Given the nature of the work and in the absence of a waiver of the Nonmanufacturer Rule, it was not clear how an 8(a) contractor would meet the 50 percent rule. [*See FAR 52.219-14, Limits on Subcontracting.*]

D. Evaluation/Source Selection

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1. The evaluation of past performance information was insufficiently documented in the file.
2. The file documentation referred to “best and final offer” while the FAR has been changed to “final proposal revision.”
3. The file indicates that the contractor was determined responsible but did not provide sufficient backup information in support of that determination.
4. This acquisition for commercial items inappropriately followed FAR Part 15 procedures. *[See FAR Part 12, Acquisition of Commercial Items, and FAR Subpart 13.5, Test Program for Certain Commercial Items.]*

E. Contract Document

1. IDIQ Contracts
 - a. The IDIQ contract stated a “ceiling” price in one part of the contract and a higher “maximum” in another. *[Two comments.]*
 - b. Ordering procedures (guidelines) were not included in an IDIQ multiple award contract. *[Two comments.]*
 - c. An IDIQ contract stated that the minimum order under the contract was \$25,000 while another section indicated the guaranteed minimum was \$250. Under FAR § 16.504(a)(1) any “amount guaranteed paid to the contractor” should be the same amount as the “stated minimum quantity of supplies or services.” Thus, under the contract, the guaranteed minimum must be \$25,000, not \$250.
 - d. A multiple IDIQ award did not include the name of the Agency’s Ombudsman in the solicitation.
 - e. An IDIQ contract for supplies and services described only delivery orders for supplies and did not describe task orders for the service portion of the contract.

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- f. An IDIQ contract did not provide for the evaluation of past performance of task orders above \$100,000.
- 2. Equipment
 - a. The Statement of Work indicated that equipment was available under the contract but did not indicate what that equipment was or where it was located. [*Two comments.*]
 - b. The feasibility of requiring a vendor to warrant equipment beyond the manufacturer's warranty was questioned.
- 3. Organizational Conflicts [*See FAR Subpart 9.5, Organizational and Consultant Conflicts of Interest.*]
 - a. The relationship of the contractor to the "parent" company was not adequately explained.
 - b. Since the contractor was in a position to recommend that the government acquire certain goods and/or services, the CO is required to mitigate any possible conflicts at the time of award.
- 3. Options
 - a. The option clause provided that the Government "may" award an option early. That provision is inconsistent with regulation. [*An option, as a unilateral right of the Government, is fixed in time, place and quantity. Exercising an option early alters the basic terms of the option and constitutes a negotiation that requires a justification and a bilateral agreement.*]
 - b. FAR 17.202, Use of options, indicates that the inclusion of an option is not normally in the best interest of the government when an indefinite quantity contract is more appropriate.
- 4. Intellectual Property Rights
 - a. The Government proposed to restrict the contractors' patent rights without obtaining a deviation. [*The standard for research and development funded by the Government is that contractors may patent inventions first produced under a contract. The*

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*Government may not unreasonably restrict the contractor's right to patent inventions. **Two comments.***

- b. The government proposed to restrict the contractors' rights to data under the contract without obtaining a deviation. *[Pursuant to FAR 52.227-14, Data Rights—General, the government has unlimited rights to use data first produced under the contract, but the government does not have the right to unreasonably restrict the contractor's right with regard to that data without a formal deviation signed by the Director, NIH. **Two comments.**]*
 - c. The OGC in its review of a NIH presolicitation stated that the NIH may not require the contractor to obtain the contracting officer's written approval before publishing the results of or discussing preliminary findings of HHS funded research. *[See HHSAR 352.224-70, Confidentiality of Information, specifically §(f) and Stanford v. Sullivan 773 F. Supp. 472 (U.S District Court, D.C., 1991.)]*
- 5. The proposed contract contained extensive language appropriate only to solicitations. *[**Two comments.**]*
 - 6. The contract incorporated the wrong general clause listing. *[**Two comments.**]*
 - 7. Based on an analysis of the proposed labor, it was not clear that the contractor could meet the requirement of FAR 52.219-14, Limitations on Subcontracting, that at least 50 percent of the cost of the contract performance incurred for personnel be performed by the 8(a) company.
 - 8. The contract document referred to the "COTR" [Contracting Officer Technical Representative] and "Project Manager." If those terms were used, then the contract would have to specify the duties and responsibilities of both positions. It was suggested that the Project Officer, which is the generally accepted designation at HHS, be used.
 - 9. The reader should be able to relate each CLIN to a deliverable in the contract.
 - 10. Incentive plans should provide for both positive and negative incentives.

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11. Practically everyone proposed under the contract, i.e., supervisors, surveyors, technicians and clerks, was included in the Key Personnel Clause. This gave the appearance of a personal services relationship.

F. Small Business Issues

1. The solicitation did not follow the recommendations found on the HHS-653, DHHS Small Business Set Aside Review Form, that indicated that some of the contracts under a multiple award IDIQ solicitation should be set aside for HUBZones.
2. The HHS-653, DHHS Small Business Set Aside Review Form: The form contained wrong information, some required fields were not completed, did not have the proper signature or was missing from the file. [*Five comments.*]
3. The contract document included extraneous requirements such as a small business subcontracting plan in a contract set-aside for a small business. [*Two comments.*]
4. It was suggested that the sample subcontracting plan be incorporated into the solicitation. [*Three comments.*]

F. Cost Issues

1. Certified Cost and Pricing Data
 - a. The CO inappropriately waived the requirement for Certified Cost or Pricing Data.
 - b. The CO obtained Certified Cost or Pricing Data but did not include the Representations and Certifications in the contract.
 - c. The Certificate of Certified Data was dated prior to the date that final agreement on cost issues was reached.
 - d. Since certified cost and pricing data was required, the contracting officer had to establish prenegotiation objectives documenting the pertinent issues to be negotiated and the cost objectives. The contracting officer is also required to perform a profit or fee objective. [*See FAR §15.406-1. Two comments.*]

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- e. When obtaining certified cost and pricing data, contracting officers are required to document the file with the exception that allows them to obtain certified data. [See FAR 15.403-4.]

2. Analysis/Cost Reasonableness

- a. It appeared that the “burdened” labor rates may duplicate costs normally found in the indirect cost pool. For example, the direct labor included vacation and holidays, which are normally part of the fringe rate. However, since there was no breakdown of the labor rates provided, this could not be determined.
- b. The summary indicated that proposed prices were fair and reasonable based on a comparison with competitive published price lists, but no documentation was provided in support of that conclusion.
- c. The summary indicated that proposed prices were fair and reasonable based upon a comparison with historical pricing, but no documentation was provided to support that conclusion.
- d. The file indicated that the an escalation factor of four percent was in line with the CPI forecast, when the CPI actually indicated a three percent escalation factor for that period of time.
- e. Documentation supporting the salary rate was not included in the file.
- f. Without a sample task order (or some other method where costs could be analyzed) it was not possible to make a determination that the prices proposed were fair and reasonable.
- g. The contractor made a mistake in calculating the indirect cost rate and the Government inappropriately decided to leave the “left-over” monies in the contract to cover future contingencies.
- h. The CO inappropriately waived “field pricing support” by DFAS.

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- i. The cost proposal included a line item for printing and reproduction when printing was an unallowable cost. [*Three comments.*]
 - j. The file contained three quotes for a piece of equipment but the file was not documented as to why the lowest quote was not accepted.
- 3. Fee/Profit Structured Approach
 - a. Language concerning fee should be structured such that it does not appear that the Government is using cost-plus-a-percentage-of-cost to determine the contractor's fee.
 - b. The CO did not use the Weighted Guidelines assessment in determining the fee. [*Two comments.*]
- 4. Article B.3., Provisions Applicable to Direct Costs, paragraph b., Travel Costs, subparagraph (2), contractors are no longer authorized to utilize the Government discount air fares known as GSA's City Pair Program. GSA cautions agencies that the purchase of contract fare tickets on behalf of cost reimbursable contractors is a misuse of the city Pair Program. For information on GSA's Government Discount Airfares see "Frequently Asked Questions" on the GSA web site.
- 5. The reasonableness of the subcontract costs were not adequately documented.
- 6. Overhead rates were not applied in accordance with the organization's Indirect Cost Rate Agreement. [*Three comments.*]